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Francis a/l Augustine Pereira v Dataran Mantin Sdn Bhd & Ors and other appeals

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02(f)-91–11 OF 2012(B), 02(f)-93–11 OF 2012(B), 02(f)-94–12 OF 2012(B) AND 02(f)-95–12 OF 2012(B)

ARIFIN ZAKARIA CHIEF JUSTICE, SURIYADI, AHMAD MAAROP, HASAN LAH, ZALEHA ZAHARI FCJJ

17 OCTOBER 2013

Companies and Corporations — Scheme of arrangement — Approval by the court — Company in winding up process — Whether scheme prefer one group of creditors while excluding another — Class of creditors — Whether to mean group of creditors having similar rights enabling them to consult together to achieve common interest — Undue preference or pari passu principle in winding up company — Companies Act 1965 s 176

The first respondent ('DM'), a property development company, was involved in the development of a township ('the BUTL project') and a condominium project ('the housing project'). The housing project was carried out in joint venture with DM's wholly-owned subsidiary ('Mico Vionic') on land owned by the subsidiary and which was charged to OCBC Bank. After only 35% was completed, construction on the housing project was abandoned. DM defaulted in its repayments to OCBC Bank and other unsecured creditors. As a result, a creditor presented a winding up petition against the company and appointed provisional liquidators. Whilst the winding up proceedings were underway, a group of purchasers in the housing project sought the approval of the High Court to a scheme of arrangement ('the scheme') for DM to settle its dues. Under the scheme, a 'white knight' was to acquire and complete the housing project after redeeming the land from OCBC Bank and settling the debts of DM's creditors under the housing project. However, the scheme excluded all other secured and unsecured creditors of the company. The High Court approved the scheme ('the sanction order') which had the support of the provisional liquidators. Four unsecured creditors of DM, including a company named Legenda and one Francis applied to set aside the sanction order claiming that DM owed Legenda a substantial debt for services rendered under the BUTL project and compensation for Francis for having been unfairly dismissed. The High Court set aside the sanction order. The Court of Appeal, reversed the decision, holding that the scheme did not unduly prefer one set of creditors over another as it was a compromise between the secured and unsecured creditors under the housing project. Hence the present appeal where the appellants argued that the Court of Appeal failed to appreciate that they shared the same rights and interests as the unsecured creditors under the

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housing project in obtaining a settlement of their debts; that the creditors under the housing project by themselves, to the exclusion of all other unsecured creditors of DM, could not constitute a 'class of creditors' within the meaning of s 176 of the Companies Act 1965 ('the Act'); and that the same provision was offended when the scheme only benefited the creditors of a specific project of the company rather than all the creditors of DM as a whole.

Held, dismissing the appeals with costs:

(1) The creditors under the housing project could be recognised as a distinct class of creditors of DM as their rights were not so dissimilar as to make it impossible for them to consult together with a view to their common interest. The creditors of the housing project were rightly classed because it would have been impossible for them to consult with the other unsecured creditors of the company, including the appellants, as their interests were not common (see para 50).

(2) The object of s 176 of the Act was to enable compromises to be made for the common benefit of the creditors as creditors, or for the common benefit of some class of creditors as such. Therefore, the scheme in the instant case was within the spirit of s 176 of the Act and the approval of it by the sanction order was not defective. The Court of Appeal was right in holding that Legenda and Francis should address their claims to the liquidators of DM (see paras 50–51).

(3) If the scheme were to be set aside, OCBC Bank, as the only secured creditor would be compelled to realise the land charge by obtaining a court order for sale of the project land and auction of the same, under the National Land Code. If that were to happen, the proceeds from the auction sale of the project land would have to be paid first to OCBC Bank. The amount owed to OCBC Bank was more than the current value of the project land (see para 41).

(4) The parties who were truly aggrieved were the purchasers in the housing project and OCBC Bank as the only secured creditor. The main objective of the scheme was to revive the housing project so that the 660 purchasers could obtain their respective units, obtain liquidated damages for late delivery and settle the outstanding loan due to OCBC Bank (see para 60).

[Bahasa Malaysia summary

Responden pertama ('DM'), sebuah syarikat pembangunan hartanah, terlibat dalam pembangunan sebuah bandar ('projek BUTL') dan projek kondominium ('projek perumahan'). Projek perumahan tersebut dijalankan melalui usaha sama dengan subsidiari yang dimiliki sepenuhnya oleh DM ('Micro Vionic') atas tanah yang dimiliki oleh subsidiari tersebut dan yang mana dipajakkan kepada OCBC Bank. Selepas hanya 35% lengkap,

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pembangunan atas projek perumahan tersebut dihentikan. DM ingkar dalam pembayaran semula kepada OCBC Bank dan pemiutang-pemiutang tanpa sekuriti yang lain. Akibatnya, seorang pemiutang mengemukakan petisyen penggulungan kepada syarikat dan melantik pelikuidasi-pelikuidasi bersyarat. Sementara prosiding penggulungan berjalan, sekumpulan pembeli dalam projek perumahan memohon kebenaran Mahkamah Tinggi untuk membuat satu skim perancangan ('skim') untuk DM menyelesaikan hutang-hutangnya. Di bawah skim tersebut, satu 'kesatria' akan mengambil dan menyempurnakan projek perumahan selepas menebus tanah tersebut daripada OCBC Bank dan menyelesaikan kesemua hutang pemiutang-pemiutang DM di bawah projek perumahan. Walau bagaimanapun, skim tersebut mengecualikan pemiutang-pemiutang syarikat bersekuriti dan tanpa sekuriti yang lain. Mahkamah Tinggi meluluskan skim tersebut ('perintah sekatan') yang mendapat sokongan pelikuidasi-pelikuidasi bersyarat. Empat pemiutang tanpa sekuriti DM, termasuk sebuah syarikat yang dikenali sebagai Legenda dan seorang yang bernama Francis memohon untuk mengetepikan perintah sekatan tersebut, mendakwa bahawa DM berhutang kepada Legenda sejumlah hutang yang besar bagi perkhidmatan yang diberikan di bawah projek BUTL dan pampasan bagi Francis kerana dipecat secara tidak adil. Mahkamah Tinggi mengetepikan perintah sekatan. Mahkamah Rayuan, dalam mengakas keputusan tersebut, memutuskan bahawa skim tersebut tidak memilih secara wajar sekumpulan pemiutang berbanding satu lagi kerana ia adalah kompromi antara pemiutang-pemiutang tanpa sekuriti dan bersekuriti di bawah projek perumahan. Oleh itu, rayuan ini di mana perayu-perayu menghujahkan bahawa Mahkamah Rayuan gagal untuk mempertimbangkan bahawa mereka berkongsi hak dan kepentingan yang sama sebagai pemiutang tanpa sekuriti di bawah projek perumahan dalam mendapatkan penyelesaian hutang-hutang mereka; bahawa pemiutang-pemiutang di bawah projek perumahan dengan sendirinya, mengecualikan kesemua pemiutang DM tanpa sekuriti yang lain, tidak boleh mengkategorikan 'kelas pemiutang' dalam maksud s 176 Akta Syarikat 1965 ('Akta'); dan bahawa peruntukan yang sama yang dilanggar hanya memanfaatkan pemiutang-pemiutang projek khusus dan bukan kesemua pemiutang-pemiutang DM.

Diputuskan, menolak rayuan-rayuan dengan kos:

(1) Pemiutang-pemiutang di bawah projek perumahan tidak boleh diiktiraf sebagai kelas pemiutang DM berasingan kerana hak-hak mereka bukanlah tidak sama hingga menjadikan ia tidak mungkin untuk mereka berunding bersama berdasarkan kepentingan bersama. Pemiutang-pemiutang projek perumahan diklasifikasikan dengan betul kerana adalah tidak mungkin bagi mereka untuk berunding dengan pemiutang-pemiutang syarikat yang lain, tidak termasuk perayu-perayu, kerana kepentingan mereka tidak sama (lihat perenggan 50).

(2) Tujuan s 176 Akta adalah untuk membolehkan kompromi dibuat bagi

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manfaat bersama pemiutang-pemiutang sebagai pemiutang-pemiutang, atau bagi manfaat bersama kelas pemiutang sedemikian. Oleh itu, skim dalam kes ini adalah dalam inti pati s 176 Akta dan kebenaran terhadapnya oleh perintah sekatan tidak cacat. Mahkamah Rayuan betul dalam memutuskan bahawa Legenda dan Francis sewajarnya menujukan tuntutan-tuntutan mereka kepada pelikuidasi-pelikuidasi DM (lihat perenggan).

(3) Sekiranya skim tersebut diketepikan, OCBC Bank sebagai satu-satunya pemiutang bersekuriti terpaksa merealisasikan pajakan tanah dengan mendapatkan perintah jualan mahkamah bagi projek dan lelongannya, di bawah Kanun Tanah Negara. Jika itu berlaku, hasil daripada jualan lelong tanah projek tersebut perlu dibayar terlebih dahulu kepada OCBC Bank. Jumlah yang terhutang kepada OCBC Bank adalah lebih daripada jumlah semasa tanah projek (lihat perenggan 41).

(4) Pihak-pihak yang benar-benar terkilan apabila pembeli-pembeli dalam projek perumahan dan OCBC Bank adalah pemiutang bersekuriti. Objektif utama skim adalah untuk menghidupkan semula projek perumahan agar 660 pembeli yang lain akan mendapat unit masing-masing, mendapat pampasan likuidasi bagi penyerahan lewat dan menyelesaikan pinjaman terhutang dengan OCBC Bank (lihat perenggan 60).]

Notes

For cases on approval by the court, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 876–882.

Cases referred to

Alabama, New Orleans, Texas and Pacific Junction Railway Company, Re [1891] 1 Ch 213, CA (refd)

Butterworth Products & Industries Sdn Bhd (Khaw Saw Mooi & Ors, Petitioners), Re [1992] 1 MLJ 429, HC (refd)

Hawk Insurance Co Ltd, Re [2001] 2 BCLC 480, CA (consd)

Hew Sook Ying v Hiw Tin Hee [1992] 2 MLJ 189, SC (refd)

Hitachi Plant Engineering & Construction Co Ltd and another v Eltraco International Pte Ltd and another appeal [2003] 4 SLR 384, CA (refd)

Jin Lin Wood Industries Sdn Bhd & Ors v Mulpha International Bhd No 2 [2005] MLJU 326; [2005] 7 CLJ 208, HC (refd)

Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 2 MLJ 449, SC (refd)

Macaura v Northern Assurance Co Ltd and others [1925] AC 619, HL (refd)

Perbadanan Kemajuan Kraftangan Malaysia v DW Margaret a/p David Wilson (t/a Kreatif Kraf) [2010] 2 MLJ 713; [2010] 5 CLJ 899, FC (refd)

Sime Diamond Leasing (M) Sdn Bhd v JB Precision Moulding Industries Sdn Bhd (in liquidation) [1998] 4 MLJ 569; [1998] 4 CLJ 557, FC (refd)

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Sovereign Life Assurance Co v Dodd [1892] 2 QB 573, CA (folld)

Legislation referred to

Bankruptcy Act 1967 s 53, 53(1)
Companies Act 1965 ss 176, 176(1), 292, 293, 293(1), 425
Companies Act 1985 [UK] s 425
National Land Code

Appeal from: Civil Appeal Nos B-02–119–01 of 2012 and B-02–3185–12 of 2011 (Court of Appeal, Putrajaya)

Fiona Bodipalar (Thivina Kumaran with him)(Bodipalar Ponnudurai De Silva) in Civil Appeal Nos 02–91–11 of 2012(B) and 02–93–11 of 2012(B) for the appellant.
Bastian Vendargon (V Manokaran, Gene Anand Vendargon and MR Kumar with him)(Kumar Assoc) in Civil Appeal Nos 02–94–12 of 2012(B) and 02–95–12 of 2012(B) for the appellant.
Mark Ho Hing Kheong (Lee Sit Ching with him)(Chellam Wong) in Civil Appeal Nos 02–91–11 of 2012(B) and 02–94–12 of 2012(B) for the first respondent.
Malik Imtiaz Sarwar (Wong Rhen Yen, Jenine Gill, Chloe Sia and S Ravenesan with him)(Dennis Nik & Wong) in Civil Appeal Nos 02–93–11 of 2012(B) and 02–95–12 of 2012(B) for the first to fourth respondents.
Malik Imtiaz Sarwar (Wong Rhen Yen, Jenine Gill, Chloe Sia and S Ravenesan with him)(Dennis Nik & Wong) in Civil Appeal Nos 02–91–11 of 2012(B) and 02–94–12 of 2012(B) for the second to fifth respondents.
Mark Ho Hing Kheong (Lee Sit Ching with him)(Chellam Wong) in Civil Appeal Nos 02–93–11 of 2012(B) and 02–95–12 of 2012(B) for the fifth respondent.
Mathew Thomas Philip (Tan Jee Tjun with him)(Thomas Philip) in Civil Appeal Nos 02–91–11 of 2012(B) and 02–93–11 of 2012(B) for the sixth respondent.
Yoong Sin Min (Ng Hooi Huang with her)(Shook Lin & Bok) in Civil Appeal Nos 02–94–12 of 2012(B) and 02–95–12 of 2012(B) for the sixth respondent.
Yoong Sin Min (Ng Hooi Huang with her)(Shook Lin & Bok) in Civil Appeal Nos 02–91–11 of 2012(B) and 02–93–11 of 2012(B) for the seventh respondent.

Hasan Lah FCJ (delivering judgment of the court):

INTRODUCTION

[1] These four appeals are filed against the decision of the Court of Appeal given on 10 August 2012 which reversed the decision of the High Court given on 30 November 2011 in the originating summons proceedings in the High Court of Shah Alam filed separately by Legenda Education Group Sdn Bhd ('Legenda'), Francis a/l Augustine Pereira ('Francis'), Golden Eight Property Sdn Bhd and Shaharudin bin Abdul Manap and four others. There were altogether eight related appeals in the Court of Appeal, namely Civil Appeal

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Nos B-02–3185–12 of 2011, B-02–3182–12 of 2011, B-02–3183–12 of 2011, B-02–3184–12 of 2011, B-02–116–01 of 2012, B-02–117–01 of 2012, B-02–118–01 of 2012 and B-02–119–01 of 2012.

[2] Civil Appeal No 02(f)-91–11 of 2012(B) and 02(f)-93–11 of 2012(B) were filed by Francis and Civil Appeal Nos 02(f)-94–12 of 2012(B) and 02(f)-95–12 of 2012(B) were filed by Legenda. For civil appeals filed by Francis this court allowed leave to appeal on the following question of law:

> Whether section 176 of the Companies Act can confer preference on one group of creditors whilst excluding another group altogether where the company is wound up or is in the process of being wound up.

[3] For civil appeals filed by Legenda leave was given by this court for Legenda to appeal on the following question of law:

> Who in law would constitute a class of creditors within the meaning of section 176 of the Companies Act, 1965?

[4] These four appeals are heard together since they emanated from one decision of the Court of Appeal and the issues involved are common.

BACKGROUND FACTS

[5] Dataran Mantin Sdn Bhd ('Dataran Mantin') was, at all material times, a property development company involved in the following two property development projects:

(a) a property development scheme known as the Bandar Universiti Teknologi Legenda in Mantin, Negeri Sembilan ('BUTL development'); and

(b) a partly completed luxury multi-storey condominium development known as Platinum Damansara ('the project'), being a purported joint venture with its wholly owned subsidiary, Mico Vionic Sdn Bhd ('Mico Vionic') on the land held under HS(D) 112760, PT 1428 Mukim Damansara, District of Petaling, State of Selangor ('the project land') and registered under the name of Mico Vionic.

[6] OCBC Bank (M) Bhd ('OCBC Bank') was at all material time the chargee in respect of the project land, pursuant to a third party charge created by Mico Vionic, in consideration of a credit facility granted by OCBC Bank to Dataran Mantin to complete the project.

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[7] As further security for the credit facilities, Dataran Mantin had also executed a debenture in favour of OCBC Bank creating a fixed and floating charge over the assets of Dataran Mantin.

[8] Construction on the project commenced in December 2004 but was abandoned in April 2007 when it was approximately 35% completed. There were 660 purchasers of condominium units in the project.

[9] Dataran Mantin defaulted in payments to OCBC Bank resulting in the appointment of receivers and managers of the properties of Dataran Mantin on 4 February 2008. Subsequently the joint venture agreement was terminated.

[10] Dataran Mantin also defaulted in payments to its unsecured creditors. A winding up petition was filed vide Winding Up Petition No MT6-28–21 of 2009 by Perkhidmatan Keselamatan Laksamana (M) Sdn Bhd on 22 January 2009 ('the winding up proceedings') and on 6 March 2009 the Shah Alam High Court made an order for the appointment of provisional liquidators of Dataran Mantin.

[11] Legenda, who claimed to be an unsecured creditor of Dataran Mantin for the sum of RM626,036 duly filed its notice of intention to support the petition in the winding up proceedings on 18 April 2011. Legenda claimed that the debt arose from the services rendered by Legenda to Dataran Mantin in the BUTL development.

[12] Sometime in January 2011, while the winding up proceedings were still on foot, the second to fifth respondents in Civil Appeal No 91, being the purchasers of condominium units in the project, formulated a scheme of arrangement for Dataran Mantin pursuant to s 176 of the Companies Act 1965 ('the scheme').

[13] The scheme provided for a 'white knight' to acquire the project and the project land from OCBC Bank. The white knight was to thereafter complete the development of the project and use a portion of the profits to satisfy solely the debts of the project creditors, which was defined as the secured creditors of the project (OCBC Bank), the unsecured creditors of the project and the purchasers of the condominium units in the project. The scheme excluded all the other secured and unsecured creditors of Dataran Mantin. The scheme was fully supported by the provisional liquidators of Dataran Mantin.

[14] On 17 June 2011 vide Shah Alam High Court Petition No 26 9 of 2011, the said second to the fifth respondents obtained an order approving the scheme ('the sanction order').

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[15] Legenda then commenced an originating summons proceedings in Shah Alam High Court against the second to fifth respondents and Dataran Mantin for, inter alia, a declaration that the sanction order was null and void and ought to be set aside. Three other originating summonses were filed by the other creditors of Dataran Mantin, including Francis, to set aside the sanction order on almost identical grounds.

[16] OCBC Bank, being the chargee bank thereafter sought and obtained an order to intervene and be added as a party to all the originating summonses. The other group of purchasers (the sixth respondent in Civil Appeal No 91) also applied to intervene in the proceedings and on 6 October 2011 the High Court allowed their application to intervene.

[17] After hearing submissions of all the parties in the four originating summonses the Shah Alam High Court, on 30 November 2011, allowed all the applications to set aside the sanction order with costs. On the same day the High Court wound up Dataran Mantin and appointed the official receiver as the liquidator.

[18] On 9 December 2011, the second to fifth respondents filed the notices of appeal to the Court of Appeal in respect of all the four originating summonses. On 29 December 2011 the provisional liquidators also filed notices of appeal to the Court of Appeal in respect of all the four originating summonses. The purchasers and OCBC Bank were respondents in the appeals before the Court of Appeal and they had supported the appeals and the scheme.

THE DECISION OF THE COURT OF APPEAL

[19] On 10 August 2012, the Court of Appeal unanimously allowed the appeals with costs and reinstated the sanction order. The grounds given by the Court of Appeal are as follows:

(a) a scheme of arrangement under s 176 of the Companies Act 1965 can be put in place for a class of creditors;

(b) the liquidator of Dataran Mantin can only have recourse to the assets of Dataran Mantin in any liquidation. In this case the only asset of Dataran Mantin are the shares in Mico Vionic and not the project land; and

(c) the question of undue preference does not arise because the sanction order had the blessings of the provisional liquidators of Dataran Mantin and the sanction order amounted to a compromise among the secured and unsecured creditors of the project land.

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SUBMISSIONS OF THE APPELLANTS

[20] Learned counsel for Legenda submitted that the Court of Appeal erred in law in failing to appreciate that the project creditors by themselves, to the exclusion of all the other unsecured creditors of Dataran Mantin, cannot constitute a class of creditors within the meaning of s 176 of the Companies Act 1965 ('the Act'). It was argued that under s 176 a compromise or arrangement was intended for the creditors or a class of creditors of the company and not the creditors or a class of creditors of a project of the company. In this case the scheme was formulated for the creditors of a specific project of Dataran Mantin and not the creditors of Dataran Mantin.

[21] According to learned counsel, under the scheme, the creditors were divided into three categories, namely:

(a) the secured creditor;

(b) the purchasers of the condominium units; and

(c) the unsecured creditors of the project.

[22] Category (c) above are the unsecured creditors of Dataran Mantin who provided services or supplied goods to Dataran Mantin. It was submitted that the unsecured creditors in category (c) were in the same category of the left out creditors of Dataran Mantin, including Legenda, who had also provided services and/or goods to Dataran Mantin. Category (c) creditors' right are not so 'dissimilar to that of the left out creditors to make it impossible for them to consult together with a view to their common interest'. It was therefore contended by learned counsel for Legenda that the sanction order as it stood discriminated against the left out creditors, whose interest were similar to the category (c) creditors and this was against the object of s 176 as it confiscated the rights of the left out creditors. In support of that contention the following cases were cited by learned counsel:

(a) *Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573;

(b) *Re Alabama, New Orleans, Texas and Pacific Junction Railway Company* [1891] 1 Ch 213; and

(c) *Re Butterworth Products & Industries Sdn Bhd (Khaw Saw Mooi & Ors, Petitioners)* [1992] 1 MLJ 429.

[23] It was therefore submitted by learned counsel for Legenda that the question of law posed should be answered as follows:

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A All creditors of a Company fall into a class when their rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest, irrespective of whether they are linked to a specific project, endeavor or branch office of a company.

B **[24]** Learned counsel for Francis adopted the submission of learned counsel for Legenda and further submitted that a court would not validate such a transaction where the effect of the validation was to give undue preference to some creditors. The scheme, in effect, gave preference to unsecured creditors over priority creditors and it breached the pari passu rule. Dataran Mantin was C insolvent and was in the process of being wound up. It was also contended that the scheme was in breach of s 292 of the Act which provides the list of persons who may be paid in priority to all other unsecured debts.

D **[25]** In her submission learned counsel for Francis also raised the issue relating to the claim made by Zalam Corp, which was one of the unsecured creditor under category (c) of the scheme, claiming that Dataran Mantin owed to it RM58m as there was no explanation given as to how it became a creditor for that amount. Apart from that there were some purchasers under category E (b) of the scheme who had not paid a single cent for the unit in the project.

SUBMISSIONS OF THE RESPONDENTS

[26] Learned counsel for the second to fifth respondents raised the issue of F locus standi of Francis in this case. Francis claimed to be a creditor of Dataran Mantin by reason of his being entitled to compensation due to him in connection with his having being terminated as the chief executive officer of Dataran Mantin. He did not file a proof of his debt.

G **[27]** It was further submitted that in any event there was conclusive evidence of Francis having compromised his alleged entitlements as he had, on or about 20 December 2010, entered into a settlement agreement with Dataran Mantin and another entity, Parallel Panada Sdn Bhd, for the settlement of the debt allegedly due from Dataran Mantin, purportedly for the sum of RM60,000. It H was also contended that as Francis was not a purchaser in the project and had no beneficial interest in the units of condominium he was not a creditor for the purposes of the scheme.

[28] The same issue was raised against Legenda as Legenda had not adduced I any evidence to show that it was a creditor of Dataran Mantin. Legenda alleged that it had paid the water bills on behalf of Dataran Mantin for BUTL development. Legenda also did not file a proof of debt.

[29] With regard to the issue relating to class of creditors, learned counsel

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submitted that under s 176(1) of the Act, a scheme of arrangement can be put in place for a class of creditors and a class of creditors is determined by their common interest, such interest separating them from other creditors with whom they are unable to consult together in respect of that common interest. Learned counsel then referred to three English cases which discussed the provision relating to the power to sanction a scheme of arrangement between a company and its creditors. They are *Sovereign Life Assurance Co v Dodd*, *Re Alabama, New Orleans, Texas and Pacific Junction Railway Company* and *Re Hawk Insurance Co Ltd* [2001] 2 BCLC 480.

[30] With regard to the issue of undue preference learned counsel for the second to fifth respondents submitted that as at the time the sanction order was given Dataran Mantin had not been wound up, the question of an undue preference did not arise as s 293 of the Act applies only once a company is wound up.

[31] It was also submitted that s 176 must be viewed as providing for a separate and distinct regime from that provided for in connection with the Winding-Up of companies. This is because s 176 falls within Part VII of the Act which deals with 'Arrangements and Reconstruction', whereas s 293 falls under Part X of the Act which deals with the 'winding up' of companies.

[32] Learned counsel referred to the decision of the Singapore Court of Appeal in *Hitachi Plant Engineering & Construction Co Ltd and another v Eltraco International Pte Ltd and another appeal* [2003] 4 SLR 384 to show that schemes of arrangement which potentially infringe the pari passu rule even in instances where the company is insolvent or is facing liquidation can be sanctioned by the court.

[33] It was further submitted that on the facts of this case the pari passu rule was not infringed because there was no dissipation of the assets of Dataran Mantin as it did not own the project land. Payment to the project creditors is not caught by s 293 of the Act because that payment is from the white knight of the project and not from the assets of Dataran Mantin.

[34] In response to the appellants' contention that the scheme confiscated the statutory rights of the unsecured creditors of Dataran Mantin, learned counsel for the second to fifth respondents submitted that such argument was misconceived because the scheme was a fair scheme aimed at rehabilitating the abandoned project and was for the benefit of 660 purchasers. The appellants were not the purchasers under the project and Dataran Mantin was not disposing of its asset. Furthermore, the scheme would reduce Dataran Mantin's

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indebtedness to the purchasers, OCBC Bank and the unsecured creditors of the project. In addition, the appellants could still file proof of debt against Dataran Mantin.

[35] It was also contended that Francis's application to set aside the sanction order was tainted by mala fide for the following reasons:

(a) Francis had no locus standi;

(b) Francis had proposed another scheme to revive the project which was not carried out;

(c) it was highly questionable for Francis to question the benefit and integrity of the scheme as he was the former CEO of Dataran Mantin; and

(d) as at 28 February 2011, Dataran Mantin owed a sum of RM35,813,057.06 to OCBC Bank, its secured creditor who supported the scheme. The purchase price paid by the purchaser of the project amounted to RM163,197,390.23. In contrast the purported interest of Francis was only for RM60,000.

[36] Learned counsel for the second to fifth respondents proposed that the question of law allowed in Francis's appeals be amended to delete the words 'is wound-up or' appearing therein because at the time the sanction order was given by the High Court Dataran Mantin was not wound up. In addition, Francis's application to strike out the respondents' appeal before the Court of Appeal on the ground Dataran Mantin had been wound up and as such the scheme, even if approved, could not in law be given effect having regard to the pari passu rule was dismissed by the Court of Appeal.

[37] Learned counsel for the second to fifth respondents therefore submitted that the question of law posed in Francis's appeals ought to be answered in the affirmative.

[38] Learned counsel for the other group of purchasers (the sixth respondent) also submitted that the scheme was valid under s 176(1) of the Act as that section allows a compromise or arrangement between a company and any class of creditors. With regard to the issue of whether there was undue preference in the scheme, learned counsel submitted that in ascertaining whether a scheme of compromise or arrangement was void under s 293 of the Act the court had to consider the dominant intention of the company/party in making the payment.

[39] It was also contended that the word 'property' used in s 293(1) of the Act must of necessity mean the 'property of the company'. As the project land

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was not owned by Dataran Mantin there was therefore no disposal or dissipation of the assets of Dataran Mantin by the scheme. Furthermore, it was argued that the project was, for the purposes of s 293 of the Act and s 53 of the Bankruptcy Act 1967, not an asset of Dataran Mantin but a liability as the project had an estimated collective liability of about RM239m.

[40] Learned counsel for Dataran Mantin also made similar submissions and further submitted that the sanction order was a perfected order and therefore the court had no power to alter, vary or set it aside as the court was *functus officio*.

[41] Learned counsel for OCBC Bank submitted that it was a fact that if the scheme were to be set aside, then OCBC Bank would be compelled to realise the land charge granted by Mico Vionic by obtaining a court order for sale of the project land and auction off the same pursuant to the National Land Code. The proceeds from the auction sale of the project land would have to be paid first to OCBC Bank, as the secured creditor. As at 31 December 2012 Dataran Mantin owed OCBC Bank a sum of RM42,707,322.41 which was more than the current value of the project land of RM35,000,000. As such there would not be any surplus sale proceeds to be distributed to the creditors of Dataran Mantin.

THE DECISION OF THIS COURT

[42] Essentially, the complaint of the appellants is that the scheme only took care of the creditors of Dataran Mantin in relation to the project and not other non-project creditors of Dataran Mantin.

[43] Section 176(1) of the Act reads as follows:

> (1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its member or any class of them the Court may, on the application in a summary way of the company or of any creditor or member of the company, or in the case of a company being wound up of the liquidator, order a meeting of the creditors or class of creditors or of the members of the company or class of members to be summoned in such manner as the Court directs.

[44] Section 176(1) of the Act provides that a scheme of arrangement for a class of creditors can be approved by the court. A class of creditors is determined by their common interest, such interest separating them from other creditors with whom they are unable to consult together in respect of that common interests. In *Sovereign Life Assurance Co v Dodd*, Bowen LJ formulated a test to determine which creditors fall into a separate class as follows — that a class 'must be confined to those persons whose rights are not so dissimilar as to

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make it impossible for them to consult together with a view to their common interest'. The test formulated by Bowen LJ has been consistently adopted in later cases by the English judges and by courts in other jurisdictions such as Australia, Malaysia, Singapore and Hong Kong.

[45] In *Re Alabama New Orleans Texas and Pacific Junction Railway Company* at p 243 Bowen LJ, when discussing classes of creditors, stated as follows:

> Then comes the more serious point, whether this is a compromise or arrangement which is within either the words of the section or within the true spirit of the legislation; that is to say, whether the Court has either jurisdiction to sanction it, or ought to sanction it. I do not think myself that the point of jurisdiction is worth discussing at much length, because everybody will agree that a compromise or agreement which has to be sanctioned by the Court must be reasonable, and that no arrangement or compromise can be said to be reasonable in which you can get nothing and give up everything. A reasonable compromise must be a compromise which can, by reasonable people conversant with the subject, be regarded as beneficial to those on both sides who are making it. Now, I have no doubt at all that it would be improper for the Court to allow an arrangement to be forced on any class of creditors, if the arrangement cannot reasonably be supposed by sensible business people to be for the benefit of that class as such, otherwise the sanction of the Court would be a sanction to what would be a scheme of confiscation. The object of this section is not confiscation. It is not that one person should be a victim, and that the rest of the body should feast upon his rights. Its object is to enable compromises to be made which are for the common benefit of the creditors as creditors, or for the common benefit of some class of creditors as such ...

[46] In the case of *Re Hawk Insurance Co Ltd* at pp 510–512 the English Court of Appeal, in construing s 425 of the English Companies Act 1985 (which is similar to our s 176(1)), recognised that there can be a scheme of arrangement for one distinct class of creditors having regard to the plain meaning of the words in the section. In that case, Chadwick LJ set out three different cases under which a scheme could be formulated pursuant to s 425 of the Companies Act 1985:

> [14] First, there will be cases where it is plain that the compromise or arrangement proposed is between the company and all its creditors. In such a case, s 425(1) of the 1985 Act provides for the court to order a single meeting of all the creditors.
>
> [15] Second, there will be cases where it is plain that the compromise or arrangement proposed is between the company and one distinct class of creditors; for example, unsecured trade creditors whose debts accrued before (or after) a given date. Or it may be plain that there are two (or more) separate compromises or arrangements with two (or more) distinct classes of creditors; for example, one compromise with unsecured trade creditors whose debts accrued before a given date and a separate compromise (on different terms) with unsecured trade creditors whose

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> debts accrued after that date. In such a case, the section provides for the court to order a meeting of each class of creditors with whom the compromise or arrangement is to be made. That is the plain meaning of the words in the section: 'Where a compromise or arrangement is proposed between a company and its creditors, or any class of them, ..., the court may ..., order a meeting of the creditors or class of creditors, (as the case may be)'.
>
> [16] Cases which fall into one or other of the two categories which I have described above are likely to be recognised without difficulty. More difficult to recognise are cases in a third category. Those are cases where what appears at first sight to be a single compromise or arrangement between the company and all its creditors (or all creditors of a particular description; say, unsecured creditors) can be seen, on a true analysis, to be two or more linked compromises or arrangements with creditors whose rights put them in several and distinct classes. The compromises or arrangements are linked in the sense that each is conditional upon the other or others taking effect ...

[47] In a local case of *Jin Lin Wood Industries Sdn Bhd & Ors v Mulpha International Bhd No 2* [2005] MLJU 326; [2005] 7 CLJ 2005 at p 212 the High Court, inter alia, said:

> ... The mere exclusion of a certain creditor does not open the applicants to imputations of mala fides and abuse of process. Under s 176(1), the applicants have the discretion not to compromise with all creditors and the rights of the remaining creditors are merely stayed ...

[48] The decision of the High Court was affirmed by the Court of Appeal and the respondent's application for leave to appeal to the Federal Court was dismissed.

[49] The wording used in s 176(1) of the Act, that is to say 'its creditors or any class of them', is clear and unambiguous in its meaning and as such ought to be construed in its ordinary and natural meaning (see *Perbadanan Kemajuan Kraftangan Malaysia v DW Margaret a/p David Wilson (t/a Kreatif Kraf)* [2010] 2 MLJ 713; [2010] 5 CLJ 899). Furthermore, having regard to the decisions mentioned above we are of the view that there is no restriction for the scheme to be directed at a distinct class of creditors under s 176(1) of the Act. In the instant case the creditors of the project are a distinct class of creditors.

[50] In *Re Hawk Insurance Co Ltd* Chadwick LJ, in his judgment, gave one of the examples where a compromise or an arrangement can be made between a company and one distinct class of creditors pursuant to s 425 of the English Companies Act 1988 as follows: unsecured creditors whose debt accrued before (or after) a given date. It is to be noted that the classification of the unsecured creditors in the example given is based on the date of the accrual of

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their debt. In the instant case the classification was based on a particular project. We do not see any difference between the two classifications. Creditors of the project of Dataran Mantin can, in our view, be recognised as a distinct class of creditors of Dataran Mantin as their rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest. Applying the dissimilarity test, it seems to us that the creditors of the project had been rightly classed because it would have been impossible for them to consult with the other unsecured creditors of Dataran Mantin, including the two appellants, as their interest were not common. The object of s 176 of the Act is to enable compromises to be made which are for the common benefit of the creditors as creditors, or for the common benefit of some class of creditors as such. We are therefore of the view that the scheme is within the spirit of s 176 of the Act.

[51] In the circumstances we agree with the Court of Appeal's decision that the scheme as approved by the sanction order was not defective. We are also in agreement with the Court of Appeal that Francis and Legenda, as creditors of Dataran Mantin, should address their claim to the liquidators of Dataran Mantin. The project land did not belong to Dataran Mantin and as such whatever interest Dataran Mantin had in the project land was only the shares in Mico Vionic (see *Macaura v Northern Assurance Co Ltd and others* [1925] AC 619). Furthermore the project land was charged to OCBC Bank. It is therefore not correct to say that their rights as unsecured creditors of Dataran Mantin had been confiscated.

[52] Section 293(1) of the Act provides:

> (1) Any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company which, had it been made or done by or against an individual, would in his bankruptcy under the law of bankruptcy be void or voidable shall, in the event of the company being wound up, be void or voidable in like manner.

[53] In *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449, Seah SCJ held that the transfers of the rubber estate belonging to the plaintiff company which were executed before or after the presentation of the petition for winding up of the plaintiff company were void as against the official receiver by reason of s 53(1) of the Bankruptcy Act 1967 read with s 293(1) of the Act. It was also held that the word 'property' used in s 293(1) of the Act means the 'property of the company'.

[54] Section 53(1) of the Bankruptcy Act 1967 provides:

> (1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred and every judicial proceeding taken or suffered by any person unable to pay his debts, as they become due, from his own money in

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favour of any creditor or any person in trust for any creditor shall be deemed to have given such creditor a preference over other creditors if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within six months after the date of making, taking, paying or suffering the same and every such act shall be deemed fraudulent and void as against the Director General of Insolvency.

[55] In *Sime Diamond Leasing (M) Sdn Bhd v JB Precision Moulding Industries Sdn Bhd (in liquidation)* [1998] 4 MLJ 569; [1998] 4 CLJ 557 the Federal Court stated that the principle underlying s 293(1) of the Act is that where a debtor company has, at a relevant time, given a preference to any person, the liquidator may apply under that section to have the preference set aside. The object of the rules of bankruptcy in respect of fraudulent preferences is to prevent a creditor from obtaining for himself an unfair advantage at the expense of the other creditors by concluding a transaction with the company during the twilight period preceding the winding up of the company.

[56] In that case the Federal Court further held that the court had no power to set aside payments and transfers made in favour of a particular creditor, unless the liquidator can satisfy the court that:

(a) the transaction took place within six months prior to the commencement of the winding up;

(b) the transaction was one described in s 53(1) of the Bankruptcy Act 1967;

(c) the transaction took place at a time when the company was insolvent;

(d) the transaction was effected in favour of a creditor of the company; and

(e) the transaction conferred on that creditor a preference, priority or advantage over other creditors in the winding up.

[57] On the facts of this case we are of the view that the element of undue preference in the scheme which is contrary to s 293 of the Act read together with s 53 of the Bankruptcy Act 1967 was absent. This is because the project land was not the property of Dataran Mantin but owned by Mico Vionic which was not involved in BUTL development or any other Dataran Mantin projects. As mentioned earlier the word property used in s 293(1) of the Act means the property of the company, Dataran Mantin. In *Hew Sook Ying v Hiw Tin Hee* [1992] 2 MLJ 189 the Supreme Court held that the shareholders of a company had no legal interest in the land owned by the company.

[58] We are therefore in agreement with the Court of Appeal on this issue when the Court of Appeal said in its judgment that:

In our judgment, the liquidator of the second respondent can only have recourse to

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A the assets of the second respondent in any liquidation. Viewed from this perspective, the only asset of the second respondent are the shares of the wholly owned subsidiary registered in the name of the second respondent and not the project land. Against this background fact, in our judgment, since the liquidator cannot have recourse to the project land, there is even less reason for the creditors of the second respondent to assert a right to set aside the 176 Order which really amounts to a compromise among the secured and unsecured creditors of the project land belonging to the subsidiary of the second respondent. For this reason and because the 176 Order had the blessings of the provisional liquidators of the second respondent, the question of undue preference does not arise.

[59] It is an undisputed fact that OCBC Bank was the only secured creditor. If the scheme were to be set aside, the OCBC Bank would be compelled to realise the land charge granted by Mico Vionic by obtaining a court order for sale of the project land and auction off the same, pursuant to the National Land Code. If that were to happen, the proceeds from the auction sale of the project Land would have to be paid first to OCBC Bank. As at 31 October 2012 the amount owed to OCBC Bank was RM42,707,322.41 which was more than the current value of the project land of RM35,000,000. There would not be any surplus sale proceeds to be given to Mico Vionic and the creditors of Dataran Mantin. It is clear that the actions by Legenda and Francis do not in fact benefit Dataran Mantin's creditors and appear pointless.

[60] The parties who were in fact truly aggrieved in this entire affair would be the purchasers of the condominium units in the project and OCBC Bank as the only secured creditor. The main objective of the scheme was to revive the abandoned project so that the 660 purchasers could obtain their respective units. The scheme would reduce Dataran Mantin's indebtedness to all purchasers in the form of liquidated damages for late delivery and the outstanding loan due and owing to OCBC Bank.

[61] It is also to be observed that the scheme was not objected to by the provisional liquidator. Section 53(1) of the Bankruptcy Act 1967 renders void as against the Director General of Insolvency, a transfer of property under the circumstances mentioned under that section as such transfer is deemed as giving a creditor a fraudulent preference over the other creditors. It does not say that such transfer is void as against other creditors.

[62] As regards the contention that the scheme is in breach of s 292 of the Act, we agree with learned counsel for the second to fifth respondents that based on the decided cases from the Commonwealth countries a scheme of arrangement under s 176 of the Act can depart from the undue preference or pari passu principle if the company goes into liquidation. On this issue, suffice for us to refer to the decision of the Singapore Court of Appeal in *Hitachi Plant Engineering & Construction Co Ltd and another v Eltraco International Pte Ltd*

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and another appeal where the court, after considering the relevant decisions across the Commonwealth said, inter alia, that in England the courts have sanctioned scheme of arrangement which potentially infringe the pari passu rule even in instances where the company is insolvent or is facing liquidation. At paras 83–84 of the judgment the Singapore Court of Appeal said:

> 83 These principles were followed in *Re Anglo American Insurance Ltd* [2001] BCLC 755. In that case, the court was asked to sanction a scheme of arrangement which, in the event of a subsequent liquidation, imposed on the liquidator provisions which differed from the statutory scheme on liquidation. The court sanctioned the scheme. In his decision, Neuberger J quoted the principles enunciated by Dillon LJ in *Re Bank of Credit and Commerce International SA (No 3)* with approval and said at 765 of the report:

> The second issue is whether the court has jurisdiction to impose a scheme, in effect, on a liquidator which is in any way different from the statutory scheme which applies on liquidation. In general, while I believe that the court should be very careful before making an order which would involve approving a scheme which differs in any way from the statutory scheme appropriate to liquidations in terms which would carry over and be binding on a subsequent liquidator, I do consider that the court has jurisdiction to make such an order. It appears to me that s 425 (the equivalent of our s 210) can be invoked to provide for a binding scheme, binding on the liquidator and the liquidation, after the company has gone into liquidation and liquidators have been appointed. [I]f s 425 can be invoked so as to bind the company, and therefore the liquidator and the creditors, after the company has gone into liquidation, it is hard to see any logic or sense in the court not being able to approve a scheme before the company has gone into liquidation so as to bind the company and the liquidator after it has gone into liquidation. That is particularly true in a case such as this, where a petition to wind up the company has been presented because the company is insolvent, and indeed where the scheme is intended to bind all the creditors, those creditors have voted overwhelmingly to support the scheme, and subject to one point, the scheme proposals do not alter the substantive right of the secured or preferential creditors or the rules relating to set-off, and in particular r 4.90 of the Insolvency Rules 1986, which would apply in liquidation.
>
> Furthermore, the court often is asked to approve a scheme in a case just such as this, namely, where the company is insolvent. The scheme requires to be managed on the basis that, subject to the specific sort of events which are catered for in the scheme itself, which would involve the scheme administrators coming back to court and asking for the scheme to be discharged, they expect to be carrying it on on a long-term basis. If at any time the scheme was liable to be destroyed by a petition to wind up the company, it would render the potential effectiveness of such a scheme nugatory, or at any rate much reduced.

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> 84 We find these authorities to be persuasive. Instances where a scheme of arrangement proposes to depart from the provisions of the insolvency regime will be rare. The actual circumstances and facts of each case will determine if such a scheme should be sanctioned. Future cases will decide when and under what circumstances such a departure will be allowed in Singapore. Suffice it for us to say, for the purposes of the present appeals, that in England the courts have sanctioned scheme of arrangement which potentially infringe the pari passu rule even in instances where the company is insolvent or is facing liquidation. A fortiori, a departure from the pari passu principle should be allowed in other corporate rescue mechanisms outside the insolvency regime.

[63] With regard to the issue of whether Francis had locus standi to apply for the sanction order to be set aside or whether Francis's application was tainted by mala fide we find it unnecessary to deal with the issues at this stage. Those issues should have been raised and fully argued before the High Court where sufficient evidence ought to be adduced so that the High Court could make a finding of facts on the matters. For the purpose of this appeal we would assume that Francis had locus standi and his application to set aside the sanction order was not tainted by mala fide. We therefore only confine our decision on the questions of law posed in these appeals.

CONCLUSION

[64] We agree with the submission by learned counsel for the second to fifth respondents that the question before the court in Francis's appeals ought to be amended to reflect the issue more precisely by removing the phrase 'is wound up or'. Our answer to the question posed in Francis's appeals as amended is in the affirmative.

[65] With regard to the question of law posed in Legenda's appeals, our answer is as follows:

> All creditors of a company whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.

In other words, we agree with the test formulated by Bowen LJ in *Sovereign Life Assurance Co v Dodd*, which is still a good law.

[66] In the result we dismiss the four appeals with costs and affirm the decision of the Court of Appeal.

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Appeals dismissed with costs.

Reported by Afiq Mohamad Noor